Supreme Court, U.S.
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No. 97-144

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STEVE PEARSON,

Petitioner,

v.

GARY DALE HINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court adopt a new standard in First Amendment retaliation cases, contrary to precedent, when there is no conflict between the circuits over the applicable standards?

2. Is the due process "some evidence" standard applicable in reviewing the conduct of an officer who issues a false and retaliatory disciplinary charge?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Gary Dale Hines respectfully requests that this Court deny the petition for writ of certiorari seeking review of the United States Court of Appeals for the Ninth Circuit's decision in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For

the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent, Gary Dale Hines, a prison inmate, brought this action alleging that Petitioner, Steve Pearson, a correctional officer, retaliated against him for exercising his First Amendment rights by issuing a false rules violation report against Respondent. Petitioner was found by a jury to have knowingly falsely accused Respondent in a Rules Violation Report, and that Petitioner's motive for doing so was to retaliate against Respondent for his use of the prison grievance system. The jury further found that Petitioner's conduct did not advance any legitimate penological goals.

The trial judge below denied Petitioner's post-trial motion for judgment as a matter of law and motion for new trial. The court of appeals affirmed the trial judge's findings. *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997).

REASONS FOR DENYING THE WRIT

II. THE JUDGMENT BELOW FALLS SQUARELY WITHIN GUIDELINES SET OUT IN U.S. SUPREME COURT CASES GOVERNING PRISONER CIVIL RIGHTS

Hines' claim that Pearson's false rules violation report was filed in retaliation of Hines' prior use of the prison grievance system is one of the limited First Amendment rights retained by prisoners. It is well established that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Included in those rights is a prisoner's right to petition the government for redress of grievances. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). This right was recently reaffirmed when this Court recognized that prisoners retain "protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available."

Sandin v. Conner, 132 L. Ed. 2d 418, 432 n.11 (1995). *Cf. Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996) ("It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts.").

All of the circuits have recognized a prisoner's right to bring First Amendment retaliation claims. *See McDonald v. Hall*, 610 F.2d 16 (1st Cir. 1979); *Graham v. Henderson*, 89 F.3d 75 (2d Cir. 1996); *Burkett v. Love*, 89 F.3d 135 (3d Cir. 1996); *United States v. Stotts*, 925 F.2d 83 (4th Cir. 1991); *Woods v. Smith*, 60 F.3d 1161 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 800, 133 L. Ed. 2d 747 (1995); *Ward v. Dyke*, 58 F.3d 271 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 524, 133 L. Ed. 2d 431 (1995); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994); *Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995); *Smith v. Maschner*, 899 F.2d 940 (10th Cir. 1990); *Harris v. Ostrout*, 65 F.3d 912 (11th Cir. 1995); *Crawford-El v. Britton*, 951 F.2d 1314, 1318 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62, 121 L. Ed. 2d 29 (1991).

D. PRISONERS MUST MEET A HIGH BURDEN TO PROCEED WITH RETALIATION CASES

Petitioner's contention that "[t]he Hines decision stands as a roadmap for state prisoners who seek to avoid the standards and competing interests that apply in challenges to the prison disciplinary process" is without merit. Pet. 5. In *Pratt v. Rowland*, the Ninth Circuit reexamined its prisoner retaliation law in light of the guidelines set forth in *Turner v. Safley* and *Sandin v. Conner*. In *Pratt*, the court recognized that while retaliation cases "fall within the other protection[s] from arbitrary state action," courts need to "afford appropriate deference and flexibility to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Pratt v. Rowland*, 65 F.3d at 807 (citing *Sandin v. Conner*, 132 L. Ed. 2d 418 (1995)) (internal quotations omitted). Under these guidelines prisoners must meet the high burden of proving 1) that a prison official's allegedly retaliatory actions were motivated by the inmate's protected conduct, and 2) that the retaliatory action advanced no legitimate penological interest. *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) (citing *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994)); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (citing *Pratt v.*

Rowland, 65 F.3d 802 (9th Cir. 1995)). This is basically the same analysis used in *Mount Healthy City School Board of Education v. Doyle*, 429 U.S. 274 (1977), in which this Court established that in a § 1983 claim that a state actor retaliated against a plaintiff for exercising a constitutional right, the plaintiff has the initial burden of showing that his constitutionally protected conduct was a motivating factor in the defendant's retaliatory conduct, at which point the burden shifts to the defendant to prove by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct. *See Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996).

Respondent has met this two pronged hurdle of motive and legitimate penological goals since the beginning of this action. It was applied in Petitioner's motion for summary judgment. *See Hines v. Gomez*, 853 F. Supp. 329 (N.D. Cal. 1994) ("The defendants' motion purported to challenge plaintiff's evidence of retaliatory motive; however, as plaintiff noted in his opposition, defendants did not submit evidence which was properly authenticated and therefore admissible under Federal Rule of Civil Procedure 56(e)." *Hines v. Gomez*, 853 F. Supp. at 330 n.3; and "Moreover, defendants did not attempt to establish by a preponderance of

the evidence that the allegedly retaliatory acts would have occurred regardless of plaintiff's inmate appeals." *Hines v. Gomez*, 853 F. Supp. at 332 n.9.) This test was part of the instructions given to the jury. RT 559:3-18. Finally, the court of appeals applied this test in their review of the case. *See Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) ("Hines' retaliation claim must rest on proof that Pearson filed the disciplinary action against him in retaliation for Hines' exercise of his constitutional rights and that the retaliatory action advanced no legitimate penological interest.").

Petitioner's assertion that "[t]he constitutional balance struck by this Court in assessing prisoner First Amendment claims . . . is skewed when the claim bears the label of retaliation" is incorrect. Pet. 5 (citations omitted). The Ninth Circuit has incorporated this Court's concerns regarding the institutional interests of prisons in its prisoner retaliation cases by reviewing whether there are any legitimate penological goals behind prison officials' allegedly unconstitutional conduct. No conflict with Supreme Court precedent exists and certiorari is not appropriate. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or

the misapplication of a properly stated rule of law.").

B. PETITIONER'S PROPOSAL THAT ONLY SIGNIFICANT DEPRIVATIONS MAY FORM THE BASIS FOR A RETALIATION CLAIM PRESENTS NO QUESTION FOR REVIEW

Petitioner's request that this Court establish a rule that only significant deprivations may form the basis for a retaliation claim does not present a substantial question of law for review as there is no disagreement on the injury requirement in prisoner retaliation cases. It is a settled doctrine of law that the injury asserted in a First Amendment retaliation case is the retaliatory action's chilling effect on a prisoner's First Amendment rights. *See Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989) ("Because state action designed to retaliate against and chill political expression strikes at the heart of the First Amendment, all that [plaintiff's] complaint needs so as to avoid dismissal are allegations that [defendant's] conduct was motivated by an intent to retaliate for his exercise of constitutionally protected rights." (internal cites omitted)); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (retaliatory action complained of by prisoner does not have to independently violate the

Constitution); *ACLU of Maryland v. Wimico County Md.*, 999 F.2d 780, 785 (4th Cir. 1993) (retaliation is actionable because it may tend to chill an individual's exercise of constitutional rights).

The Ninth Circuit's holdings regarding the injury inherent in First Amendment retaliation claims do not conflict with the holdings of the Fourth, Eighth, and District of Columbia circuits as asserted by Petitioner. Pet. 7. In *ACLU of Maryland v. Wimico County Maryland*, the court held that the plaintiffs failed to prove any injury as the prison officials actions "may have inconvenienced Appellees, but it did not chill, impair, or deny their exercise of First Amendment rights." *ACLU of Maryland v. Wimico County Md.*, 999 F.2d at 786 (emphasis added).

The Eight Circuit's stance that a claim for retaliation fails "when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform," *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990), is simply another way of saying that there were legitimate penological reasons for the conduct alleged to be retaliatory. Contrary to Petitioner's interpretation of Eighth Circuit retaliation law, the Eighth Circuit has held that "[b]ecause

the retaliatory filing of a disciplinary charge strikes at the heart of an inmate's constitutional right to seek redress of grievances, the injury to this right inheres in the retaliatory conduct itself," and "when retaliatory conduct is involved, there is no independent injury requirement." *Dixon v. Brown*, 38 F.3d 379, 380 (8th Cir. 1994).

In *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996), the standard approved by the District of Columbia Circuit in evaluating whether an injury was asserted in a retaliation case was "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." *Id.* at 826 (internal quotations omitted). Petitioner has failed to cite any case where the injury required in a First Amendment retaliation claim is more than the chilling effect on a prisoner's First Amendment rights.

Moreover, the authorities cited by Petitioner as examples of the dangers of current retaliation law in fact prove that courts are applying "the constitutional balance struck by this Court." Pet. 5. In *Wiideman v. Angelone*, 848 F. Supp. 136 (D. Nev. 1994), the court recognized that the seizure of the typewriter was "reasonably related to a

legitimate penological interest" and granted summary judgment against the inmate. *Wiideman v. Angelone*, 848 F. Supp. at 140. Likewise, in *Rodriguez v. Kincheloe*, 763 F. Supp. 463 (E.D. Wash. 1991), the court found that the inmate failed to prove that the defendants' actions were not supported by legitimate penological goals and dismissed the retaliation claim. *Rodriguez v. Kincheloe*, 763 F. Supp. at 472.

Kent v. Johnson, 821 F.2d 1220 (6th Cir. 1987), involved an inmate's First Amendment right to the free exercise of his religious beliefs. While the *Kent* court remanded the case back to the district court, the court recognized that prison officials' legitimate penological objectives must be recognized. *Id.* at 1225. Sixth Circuit retaliation cases since *Turner v. Safley* emphasize that prison officials' conduct is permissible where it serves a legitimate penological purpose. *See Ward v. Dyke*, 58 F.3d 271, 275 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 524, 133 L. Ed. 2d 431 (1995).

Hall v. Sutton, 755 F.2d 786 (11th Cir. 1985), predates *Turner v. Safley*, 482 U.S. 78 (1987). Eleventh Circuit retaliation law subsequent to *Turner v. Safley* has

held that a prisoner's limited right of access to the courts may not be burdened with practices that are not reasonably related to legitimate penological purposes. *See Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995).

DeGuiseppe v. Village of Bellwood, 68 F.3d 187 (7th Cir. 1995), is not relevant as it involves an action brought by policemen against a village and its police chief. In fact, the Seventh Circuit recognizes that courts "should afford appropriate deference and flexibility to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (citing *Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995) (internal quotations omitted).

Petitioner's emphasis on the punishment received by Hines as a result of Petitioner's false and retaliatory disciplinary charge is a crude attempt to shift this Court's focus away from the central issues involved in this retaliation case, which are 1) was Petitioner's conduct in filing a false rules violation report improperly motivated by Respondent's exercise of his First Amendment rights, and 2) if so, whether there is any legitimate penological interest in Petitioner's filing of a false rules violation report. The court of appeals

below applied the standards in a prisoner retaliation suit which "afford appropriate deference and flexibility to prison officials." The Ninth Circuit's holding in this case does not conflict with the holdings of any other circuit. Certiorari is therefore not appropriate in this case. Sup. Ct. R. 10(a).

C. PETITIONER FAILED TO RAISE THE ISSUE OF SIGNIFICANT DEPRIVATIONS IN THE COURTS BELOW

Not only is Petitioner's request that this Court establish a rule that only significant deprivations may form the basis for a retaliation claim without merit, but it should be waived as Petitioner failed to raise this issue in the courts below. The subject of whether the punishment received by Respondent, as a result of Petitioner's false and retaliatory disciplinary charge, is a significant deprivation or merely an "everyday hardship incident to prison life" was not raised in Petitioner's motion for summary judgment. *See Hines v. Gomez*, 853 F. Supp. 329 (N.D. Cal. 1994) ("The defendants' motion for summary judgment relied primarily on one legal theory: that plaintiff's claim of retaliation must fail because the filing of inmate appeals is not constitutionally protected

activity . . . ." *Id.* at 330; and "The court notes that defendants focused on whether the *subject* of the inmate appeal was of constitutional significance." *Id.* at 331 n.4. (emphasis in original)). Similarly, the issue was not raised at all in Petitioner's motion for judgment as a matter of law or for new trial. Petitioner raised the issue of whether the punishment received by Hines constituted an atypical and significant hardship as required in Due Process causes of action for the first time with the court of appeals. Petitioner's argument is not properly before this Court.

II. THERE IS NO SIGNIFICANT CONFLICT OVER APPLICATION OF THE "SOME EVIDENCE" STANDARD AMONG THE CIRCUITS

In *Superintendent v. Hill*, 472 U.S. 445 (1985), this Court held that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits." *Superintendent v. Hill*, 472 U.S. at 455. The court of appeals below noted that in *Hill*, this Court considered the due process protections available when a prison board makes a disciplinary decision before it applied the "some evidence

standard." *Hines v. Gomez*, 108 F.3d at 268. In deciding that the deferential "some evidence" standard should not apply to review a prison guard's allegedly false and retaliatory rules violation accusation, the court below focused on the absence of procedural safeguards protecting a prisoner from false retaliatory accusations. *Id. Cf. Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) (in rejecting the application of the "some evidence" standard in a claim of retaliation against a prisoner for pursuing a grievance, the court noted that the protected right of redress is "substantive rather than procedural and therefore cannot be obstructed, regardless of the procedural means applied" (internal citations omitted)).

Cases cited by Petitioner do not support his position that there is a conflict between the circuits in applying the "some evidence" standard. In *McKinney v. Meese*, 831 F.2d 728 (7th Cir. 1987), the prisoner alleged that "he was disciplined in retaliation for the acts of another inmate and that this violates the applicable administrative regulations and due process." *Id.* at 733. The *McKinney* case is not applicable to because 1) there are no claims of First Amendment retaliation, and 2) the prisoner was claiming a violation of his due process rights. *See Black v. Lane*, 22

F.3d 1395, 1402 n.11 (7th Cir. 1994). In a First Amendment retaliation case, the Seventh Circuit has explicitly limited the "some evidence" standard to evaluating due process claims. *See Black v. Lane*, 22 F.3d at 1402.

The current application of the "some evidence" standard in Eighth Circuit prisoner retaliation cases stems from *Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir. 1990)[1]. In *Orebaugh*, the court noted, applying the "some evidence" standard, that the prisoner admitted to performing the acts he was disciplined for and held "[w]hile a prisoner can state a claim of retaliation by alleging that disciplinary actions were based on false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform." *Id.* at 528. This is simply a restatement of the principle that a retaliation claim fails if there are any legitimate penological goals behind the prison officials' allegedly unconstitutional conduct. The Eighth Circuit recognizes that the filing of a false disciplinary charge is actionable if done in retaliation for an

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[1] It is interesting to note that the unanimous Ninth Circuit opinion in *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997), was written by the Honorable Donald P. Lay, Circuit Judge for the Eight Circuit, sitting by designation.

inmate's filing of a grievance. *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994).

In examining whether there are any legitimate penological goals behind a prison official's action, the courts are showing "appropriate deference and flexibility to state officials trying to manage a volatile environment, especially with regard to the fine tuning of the ordinary incidents of prison life." *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995) (citing *Sandin v. Conner*, 132 L. Ed. 2d 418 (1995)) (internal quotations omitted). There are no legitimate penological objectives to filing a false and retaliatory rules violation report. The court of appeals below applied the appropriate standards in evaluating Respondent's First Amendment claim.

III. THIS CASE DOES NOT PRESENT SIMILAR QUESTIONS TO THOSE BEFORE THE COURT IN *CRAWFORD-EL v. BRITTON*

While *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996), *cert. granted*, 138 L. Ed. 2d 210 (1997) involves an inmate's claim that a correctional officer retaliated against him in violation of his First Amendment rights, this Court's

decision in *Crawford-El* would not warrant reconsideration of *Hines* by the Ninth Circuit. The *Crawford-El* court determined that the inmate's retaliation claim was a viable cause of action after examining this Court's recent prison rights cases. *Crawford-El v. Britton*, 93 F.3d at 826. The *Crawford-El* court then remanded the case back down to the district court to determine whether the inmate had presented evidence of the correctional officer's impermissible motive sufficient to survive summary judgment. *Id.* at 829. The questions presented in the Petition for a Writ of Certiorari in *Crawford-El v. Britton* deal with issues of qualified immunity. *See Crawford-El v. Britton* Petition for a Writ of Certiorari, p. i. There are no issues of qualified immunity raised in *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997).

CONCLUSION

Petitioner presents no unsettled issues of law for this Court's review. The Ninth Circuit Court of Appeals decision in *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) followed well established precedents of this Court. Certiorari is not appropriate here.

Respectfully submitted,

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